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In The

Supreme Court of the United States

October Term, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, and EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

—against—

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, and JAMES H. TULLY, Jr., STATE COMMISSIONER OF TAXATION & FINANCE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL LAWYERS GUILD

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MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the National Lawyers Guild (hereinafter the NLG) moves this Court for leave to file the accompanying brief as Amicus Curiae in support of the Respondents In support of the motion, the NLG shows as follows:

1. The NLG was established in 1937 as a bar association and has since its inception been dedicated to safeguarding and extending the rights of workers. Indeed, the preamble to the National Lawyer Guild's constitution as amended provides:

"STATEMENT OF PURPOSE

"The National Lawyers Guild is an association dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers, and jailhouse lawyers of American in an organization which shall function as an effective political and social force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests. Our aim is to bring together all those who regard adjustments to new conditions as more important than the veneration of precedent, who recognize the importance of safeguarding and extending the rights of workers, women, farmers, and minority groups upon whom the welfare of the entire nation depends, who seek actively to eliminate racism, who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression." (Preamble to the Constitution of the National Lawyers Guild, originally adopted on February 22, 1937, at Washington, D.C., and most recently amended in July of 1971 at Boulder, Colorado).

The Guild in furtherance of its aims, has established a National Labor Project for the purpose of promoting and defending the rights of workers. The National Labor Project is dedicated to the advancement of the interests of working people. The membership of the National Labor Project is made up primarily of attorneys who practice law on behalf of organized labor and workers committed to reforming and strengthening the labor movement. The experiences gained by the NLG and its member attorneys in promoting the interests of workers gives the NLG a unique vantage point from which to probe the practical and legal considerations relevant to determining whether New York's payment of unemployment benefits to strikers is pre-empted under the Supremacy Clause of the United States Constitution.

2. Because of its interest in issues pertaining to matters of great public import in the area of labor and public welfare, the NLG has sought and was granted permission by this Court to file briefs as Amicus Curiae in a number of cases over the last 30 years. See, e.g., American Communications Workers, CIO v. Douds, 339 U.S. 382; Regents of the State of California v. Balke, ___ U.S. ___ (decided June 1978).

3. The movant Amicus and its members have broad knowledge and experience concerning the doctrine of Federal Labor Preemption. The Amicus are uniquely situated to brief the Court on the practices as well as legal aspects of the issues herein. The attorneys

of counsel on this brief were the authors of the Amicus brief submitted to the Court of Appeals below in this matter on behalf of over 20 labor organizations. The voice of organized and unorganized labor as well as unemployed workers is not represented by the parties to the action. The interest of the State of New York in this action is not identical to that of organized and unorganized labor nor of the unemployed. The Guild stands in the unique position of being able to speak on behalf of all of these groups of workers in view of its historic advocacy of the rights of the employed as well as the unemployed.

4. Counsel for Petitioners have informed the Movant that they consent to the filing by the NLG of a brief as Amicus Curiae. A copy of the letter of consent is annexed to the Appendix to the Movant's brief.

5. Counsel for Respondents have informed the Movant that they oppose the filing by the NLG of a brief as Amicus Curiae. A copy of their letter of opposition is attached as an appendix to the Movant's brief.

WHEREFORE, it is respectfully moved that the NLG be granted leave to file

the accompanying brief Amicus Curiae in this case.

Dated:

New York, N.Y.
July 31, 1978.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE NATIONAL LAWYERS GUILD

Statement of the Case

This brief amicus curiae is submitted on behalf of the National Lawyers Guild in support of the respondents. The amicus interest of the National Lawyers Guild (hereinafter "NLG") is set forth in the motion annexed hereto.

The relevant facts, proceedings below and statutory provisions are set forth in the Petitioners' and Respondents' papers filed with this Court. The Court is requested, however, to take special note of

the following elements of the record:

1. The statistical materials adduced at trial demonstrate that the payment of unemployment benefits to strikers has no apparent effect on collective bargaining in New York. Thus, New York has a shorter average strike duration than the average for other states (A. 511, D. Ex. 113-a). With respect to the length of those strikes that would presumably reflect most clearly the receipt of benefits, i.e., those of more than eight weeks duration, New York is only sixth of the 50 states. Rhode Island, which maintains a similar statute, is twenty-ninth.

These facts are borne out by the collective experience of the National Lawyers Guild as attorneys for workers in labor disputes as well as the record below. Workers do not lightly engage in economic warfare with their Employer. It is rarely anticipated at the outset that a strike will last as long as eight weeks. Strikes which last in excess of eight weeks reflect particularly intractable bargaining issues and are not likely to be affected by the receipt of small amounts of money in the form of unemployment benefits.

2. One of the major areas of State concern behind the payment of unemployment benefits to strikers lies in preventing the economic dislocation to the communities in which strikers reside that might otherwise attend lengthy strikes. Mr. Harold Kasper, Director of the Unemployment Insurance Division of the New York Department of Labor, testi-

fied that in 1975, 2.2 billion "hot velocity" dollars were pumped into the State's economy in unemployment benefits. These dollars quickly circulated within the communities in which strikers reside. Indeed, some of them were no doubt used to pay monthly bills to Petitioners.

I.

CONGRESS HAS EXPRESSLY PERMITTED STATES TO PROVIDE UNEMPLOYMENT BENEFITS TO STRIKERS.

A. Congressional Intent Must Be Determined by Reference to the Entire Spectrum of Legislation Which Touches the Area of Employee Benefits.

This Court re-emphasized in Malone v. White Motor Corp., 46 U.S.L.W. 4295 (Apr. 3, 1978) (No. 86-1184) that "the purpose of Congress is the ultimate touchstone" in determining whether state action is preempted under the supremacy clause, quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). In Malone, supra, the Court upheld a pre-ERISA Minnesota statute which imposed liability upon an Employer for unfunded but vested employee pension benefits. The Employer unsuccessfully argued and the lower courts held that Minnesota thereby altered the terms the Employer achieved through collective bargaining. The Court avoided measuring Congressional intent solely by the terms of the National Labor Relations Act. The Court observed:

> " . . . [T]hat there is nothing in the NLRA, including those sections on which [the Employer] relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining. If the [Minnesota] Pension Act is preempted here, the Congressional intent to do so must be implied from the relevant provisions of the labor statutes. We have concluded, however, that such implication should not be made here and that a far more reliable indicium of congressional intent with respect to state authority to regulate pension plans is to be found in §10 of the [Welfare and Pension Plans] Disclosure Act." 46 U.S.L.W. at 4297 (Emphasis in original.)

There can be no doubt that a similarly more reliable indicium of Congressional intent concerning the payment by states of unemployment benefits to strikers is to be found in the legislative history of the Federal Unemployment Tax Act, 26 U.S.C. §3301, et seq., as originally enacted and as amended.

B. Congress Expressly Intended in Enacting and Amending the Federal Unemployment Tax Act to Reserve to the States the Determination of Whether to Provide Unemployment Benefits to Strikers.

The indications that Congress did not intend to preempt states from paying

unemployment insurance to employees involved in a work stoppage or lockout are primarily found in the legislative history of the Federal Unemployment Tax Act, 26 U.S.C. §§3301, et seq., as originally enacted, and as amended. Section 3304 of the Federal Unemployment Tax Act, 26 U.S.C. §3304, as enacted in 1954, was derived from Section 1603 of the Internal Revenue Code of 1939 which was, in turn, originally derived from the Social Security Act of August 4, 1935, Pub. L. 74-271, Title IX, 49 Stat. 639-45. Section 3304 of the 1954 Act provided for state plans for the payment of unemployment insurance benefits to be submitted to the Secretary of Labor for approval and specified certain circumstances under which the state could not disqualify a person from benefits.

Section 3304(a)(5), 26 U.S.C. §3304(a)(5) provides:

> "Compensation shall not be denied . . . for refusing to accept new work . . . if the position offered is vacant due directly to a strike, lockout or other labor dispute."

Similar provisions were included in the 1935 and 1939 derivative acts except that approval of the Social Security Board rather than the Secretary of Labor was required.

This Section indicates that Congress in 1935, as well as in 1954, in enacting the laws requiring states to provide unemployment benefits clearly considered the effect of unemployment insurance on

strikes and lockouts, and refrained from barring benefits to strikers. To the contrary, while Congress removed state discretion to deny benefits to persons who refuse a position vacant due to a strike, it left to the states the decision of whether or not to pay benefits to strikers.

The court below recognized that the failure of Congress to forbid the payment of benefits is illustrated by the fact that it had been requested to do so. Hearings on S. 1130 before the Senate Comm. on Finance, 74th Cong. 1st Sess. 128 (1935) (Edmund Witte, Executive Director, President's Committee on Economic Security, recommendation on behalf of Advisory Council); id. at 472 (Dr. Abraham Epstein, American Association for Society Security, proposed draft of bill); id. at 959 (statement of Noel Sargent, National Association of Manufacturers). The Senate Committee Report stated:

> "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington."

S. Rep. No. 628, 74th Cong., 1st Sess. 13 (1935), reprinted in 1 Social Security, Documentary History of the Social Security Act of 1935 (1942), see H.R. Rep. No. 615, 74th Cong., 1st Sess. 8-9 (1935), reprinted in 1 Social Security

Documentary History of the Social Security Act of 1935 (1942). See New York Telephone Co. v. New York State Department of Labor, 566 F.2d 388, 392 (2nd Cir. 1978).

In 1977, the Federal Unemployment Tax Act was amended. In 1969, then President Nixon similarly sought to introduce into the proposed amendments before the 91st Congress a "requirement that [the] practice of paying unemployment insurance benefits to workers directly engaged in a strike be discontinued." Message from the President, 115 Cong. Rec. 18538 (1969). In reporting the bill to the House for passage, Wilbur Mills, Chairman of the House Ways and Means Committee, explained the reasons for the rejection of the President's proposal by stating:

> "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interests of their people . . . for example, there are two States . . . which will pay unemployment benefits when employees are on strike. . . . [I]f the State wants to do it we believe they ought to be given latitude to enable them to write the program they want." 115 Cong. Rec. 34106 (1969).

Furthermore, the 1970 Amendments to the Unemployment Tax Act, 26 U.S.C. §3304, provided for explicit prohibitions upon states in providing unemployment insurance to certain categories of persons. The prohibitions include payment

to aliens who have not been lawfully admitted (26 U.S.C. 3304 (14)(A)) and payment to athletes during the off season (26 U.S.C. 3304 (13)(A)). The fact that Congress in these prohibitions did not include payment to strikers while knowing that for over 35 years such payments had been made by New York as well as other states indicates that Congress did not intend to prohibit payment to strikers.

Congress' intention that it was for the states to determine whether or not to pay benefits to strikers was made equally explicit in the Senate report on the Employment Security Amendments of 1970, S. Rep. No. 91-752, 91st Cong., 22, 1970 U.S. Code, Cong. and Adm. News 3606, 3627. In commenting upon the provisions of the amendments limiting a state's powers to cancel or reduce benefit rights, this Senate Finance Committee report stated:

> "It would not prevent a State from specifying the conditions for disqualification such as, for refusing suitable work, for voluntary quitting, for unemployment due to a labor dispute in the worker's plant, etc." (Emphasis supplied.)

C. The Legislative History of the Labor-Management Relations Act of 1947, 28 U.S.C. §141, et seq., Similarly Evinces Congress' Intent Not to Preempt States From Paying Unemployment Benefits to Strikers.

Although the primary legislation from which Congress' intent is to be ascertained regarding the payment of unemployment benefits to strikers is the Federal Unemployment Tax Act, the Legislative History of the National Labor Relations Act, 29 U.S.C. §151, et seq., similarly evinces Congress' intent not to preempt states from paying unemployment benefits to strikers. The original National Labor Relations Act "the Wagner Act") was enacted on July 5, 1935 as Pub. L. No. 74-198, 49 Stat. 449. Although the original act made no mention of unemployment compensation for strikers, the legislation was enacted by the same Congress which enacted the Social Security Act on August 14, 1935, Pub. L. No. 74-271, 531, Title IX, 49 Stat. 639-45. Thus, Congress had before it both the original labor relations act and unemployment insurance act at the same time.

The original unemployment insurance act contained in Title IX of the Social Security Act of 1935, Section 903(a)(5), the provision that a state could not deny benefits to a person who refused employment where the vacancy was due solely to a labor dispute or where the person was required to join a company union or refrain from joining a union as a condition of employment. Thus, Congress affirmatively considered the interrelation of labor-management relations and unemployment insurance in passing both the Wagner Act and Title IX of the Social Security Act in 1935. That same year, New York State enacted its unemployment insurance law which provides for the payment of benefits to strikers. The New York law was in fact enacted two months before

the NLRA and 4 months before the Social Security Act. Thus, a harmonious construction of the three statutes compels the conclusion that Congress did not intend to preempt states from paying unemployment benefits to strikers.

The LMRA ("Taft-Hartley Act") was enacted in 1947 (Pub. L. No. 80-101, 41 Stat. 136 (1947)). The final version of the Taft-Hartley act as enacted contained no references to unemployment insurance. However, the legislative history of Taft-Hartley indicates that the issue of precluding states from paying unemployment insurance to strikers was considered and rejected in favor of leaving the determination to the states.

H.R. 3020 (the "Hartley Bill") as reported to the House and as passed by the House, contained in the definition of employee under section 2(3) a provision which granted employee status to a striker unless (among other conditions) the striker "is receiving unemployment compensation from any state." See 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, 34. Thus, a striker who accepted unemployment insurance would no longer be considered as "employee" under the Hartley bill as reported to the house (H.R. 3020), and would thereby lose all rights under the Act because, as the House Committee on Education and Labor report on H.R. 3020 indicated, such payment of benefits to a striker was "a perversion of the purposes of the

social security laws." H.R. Rep. No. 245, 80 Cong., 1st Sess. 12 (1947), 1 NLRB Legislative History of the Labor Management Relations Act, 1947, 303. In conference, however, the provision was dropped. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947), 1947 U.S. Cong. Service 1135, 1137-39.1/

In commenting on this provision, the House Minority Report No. 245 on H.R. 3020, stated:

"The bill apparently intends

1/ In the context of back pay awards, the Court has upheld the NLRB's long practice of treating unemployment compensation as an incidental benefit, not to be considered in computing such awards. National Labor Relations Board v. Gullett Gin Co., 340 U.S. 361, 365. In Gullett, the Court, referring to this House provision of the Hartley Bill which was rejected in 1947, added that the Board's practice regarding unemployment compensation was known to Congress when it enacted the Taft-Hartley amendments. "Under these circumstances, it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal [Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c))], Congress accepted the construction placed thereon by the Board and approved by the courts." Id. at 366. The same applies in the present context.

> to discourage States from paying unemployment compensation to strikers by penalizing employees who accept unemployment compensation. Under the Social Security Act, however, the determination of these matters was advisedly left to the States." Leg. Hist. of LMRA at 559, H.R. Rep. No. 245, 80th Cong., 1st Sess. 68, NLRB, Legislative History of the Labor Management Relations Act, 1947, 303 (1945)."

The reasoning of the minority report was apparently adopted by the conference committee. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32-35, 1947 U.S. Code, Cong. & Adm. News 1135, 1137-41, 1 NLRB, Legislative History of the Labor Management Relations Act of 1947, 536-39 (1948).

Perhaps the most compelling indication of Congress' intent not to preempt states from paying unemployment benefits to strikers is the fact that since 1935, Federal labor relations laws and federal social security laws have lived side by side with state laws, such as New York's, which allow the payment of unemployment benefits to strikers. This is especially true since both the labor relations laws and the unemployment insurance laws went

through numerous major amendments[2] without Congress acting to prohibit benefit payments to strikers (indeed the attempts to introduce such restrictions failed on each occasion as indicated above). Nor can it be argued that Congress was unaware of state laws which provided unemployment benefits

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2/ The NLRA was amended on June 23, 1947, Pub. L. 80-101, 61 Stat. 136 (Taft-Hartley); on September 14, 1959, Pub. L. 86-297, Title V, 73 Stat. 573 (Landrum-Griffin); and on July 26, 1947, Pub. Law 95-360, 88 Stat. 395. The Federal Ynemployment Tax Law as originally enacted as Title IX of the Social Security Act of 1935, was re-enacted in 1939 as part of the Internal Revenue Code, and was re-enacted on August 16, 1954 c. 736, 68 A Stat. 443 (Federal Unemployment Tax Act; which was amended on August 10, 1970, Pub. L. 91-373, Title I, 84 Stat. 699, 704, 707; on October 20, 1976, Pub. L. 94-566, 90 Stat. 2675, 2676; on November 12, 1977, Pub. L. 95-171, 91 Stat. 1353, and again amended on December 20, 1977, Pub. L. 95-216, Title IV, 91 Stat. 1561.

to strikers.[3] As early as 1947, when considering denying employee status to strikers receiving such benefits, the House Committee on Education and Labor reported in House Rep. 245, supra, at 12, 1 Leg. Hist. of LMRA at 303:

> "A few states pay strikers [unemployment compensation] after the fifth, sixth or seventh weeks. . . ."

Indeed, the Senate Report on the Social Security Act of 1935 named New York as one of the five states having a statute of the sort Congress encouraged other states to enact. S.Rep. No. 628, 74th Cong., 1st Sess., 1 Social Security Documentary history of the Social Security Act of 1935 (1942).

3/ As the First Circuit noted in Grinnell Corp. v. Hackett, 475 F.2d 449, 454 (1st Cir. 1973), cert. denied, 414 U.S. 858 (1973):

> "In July 1933, the Federal Emergency Relief Administration (FERA) ruled that it would not 'attempt to judge the merits of labor disputes' but would treat unemployed strikers like all other unemployed persons for purposes of relief . . . This policy became a bone of contention during the textile strike of September 1934 . . . Congress could hardly have been unaware of this policy when in 1935 it passed in close succession both the National Labor Relations Act . . . Title IX of which . . . is now the Federal Unemployment Tax Act . . . [citations omitted]."

This Court has uniformly held that re-enactment of a statute by Congress in the face of judicial, legislative or administrative constructions of the law without amending the construction is persuasive of a legislative recognition and approval of the construction given. Chemaheuvi Tribe of Indians v. Federal Power Commission, 420 U.S. 395, 410 (1975); Georgia v. U.S., 411 U.S. 526, 533 (1973); C.I.R. v. Noel's Estate, 380 U.S. 678.

In this case, Congress amended both the labor relations acts and the unemployment insurance acts on numerous occasions. During each such occasion, it knew that New York and other states were paying unemployment benefits to strikers and that these state plans were approved by the federal agency then in charge.[4/]

4/ The original act, Title IX of the Social Security Act of 1935, Section 903, provided for approval by the Social Security Board. The current Federal Unemployment Income Security Act, 26 U.S.C. §3304, requires approval by the Secretary of Labor. New York's law Ch. 468 was approved by both agencies and Congress was aware of such administrative approvals in enacting the various amendments.

Furthermore, this court has ruled that the construction of one act is particularly relevant to the construction given another act where both acts were enacted by the same Congress and both were designed to deal with closely related aspects of the same problem. U.S. v. American Building Maintenance Industries, 422 U.S. 271, 277 (1975). See also, Grinnell Corp. v. Hackett, 475 F.2d 449, 454 (1st Cir. 1973). As noted above, in this case, the fact that the same Congress enacted the NLRA and Title IX of the Social Security Act, with direct reference to labor disputes demonstrates that Congress considered the interrelationship of both statutes with respect to payment of benefits to strikers and chose not to prohibit states from making such payments.

D. Congress Has Also Permitted the Payment of Social Welfare Benefits to Strikers In Other Areas.

In other contexts, Congress has also indicated that the payments of social welfare benefits to strikers does not interfere with free collective bargaining. See the Railroad Unemployment Insurance Act (52 Stat. 1094, as amended, 45 U.S.C. 351, et seq.), and the Food Stamp Act (78 Stat. 703, as amended, 7 U.S.C. 2011, et seq.) which was amended in 1971 to prohibit states from denying food stamps to strikers, 7 U.S.C. 2014(c). Furthermore, Congress' stated reason for rejecting a provision denying such food stamp aid to strikers was its determination not "to take sides for labor disputes". H.R. Rep. No. 91-1402, 91st Cong., 2nd Sess. 11 (1970).

Petitioners anomalously argue that Congress' explicit refusal to allow states to deny food stamps to strikers indicates that Congress, in the case of unemployment benefits, intended the opposite. Such argument is fallacious as a matter of fact and logic. In the case of food stamps, Congress sought to proscribe states from denying benefits. As the legislative history above indicates, in the case of unemployment benefits, Congress chose to reserve to the states the determination as to whether benefits should be paid to strikers. In both cases, Congress' clear intention not to preempt states from providing social welfare benefits to its citizens who are on strike is evident.

E. This Court's Rulings Indicate that Congress In Enacting the Unemployment Tax Act and the NLRA And In Amending Those Acts Never Intended to Preempt the States from Paying Unemployment Benefits to Strikers.

This court, as well as lower courts, has reviewed the legislative history of the Federal Unemployment Tax Act and reached the conclusion that Congress did not intend to either compel or prohibit states from paying unemployment benefits to persons unemployed as a result of a labor dispute.

In Ohio Bureau of Employment Services v. Hodery, 431 U.S. 471, 97 S.Ct. 1898 (1977), the Court considered whether preemption barred an Ohio statute disqualifying workers from benefits if their unemployment was due to a labor dispute. The Court examined the Federal Unemployment

Tax Act and concluded that:

> "When Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit terms. There are numerous examples . . . less related to labor disputes but showing congressional ability to deal with specific aspects of state plans. The fact that Congress has chosen not to legislate on the subject of labor dispute qualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act intended to restrict the States' freedom to legislate on this area."

See also, Kimbell, Inc. v. Unemployment Security Commission of the State of New Mexico, 429 U.S. 804 (1976).

Thus, the legislative history of both the National Labor Relations Act and the Federal Tax Unemployment Act leads to the inescapable conclusion that Congress in enacting both laws, as well as in amending them, intended to reserve to the states the determination of whether or not unemployment benefits should be paid to striking employees.

II.

UNDER TRADITIONAL LABOR PREEMPTION DOCTRINE STATES HAVE BEEN PERMITTED TO ACT IN AREAS INVOLVING THE WELFARE OF THEIR CITIZENS WHICH HAVE ONLY A DE MINIMUS IMPACT ON COLLECTIVE BARGAINING

For the past two decades, this Court has repeatedly considered the nature and scope of the Federal Labor pre-emption doctrine. At its broadest, Federal Labor Law has been held to pre-empt the exercise of State power over activities whih are arguably subject to Section 7 or 8 of the National Labor Relations Act. Lodge 76, International Association of Machinists, AFL-CIO v. Wisconsin Emp. Relations Comm'n, 427 U.S. 132, 138-39 (1976); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959). Despite, however, the acknowledged need to avoid potential conflict between Federal and State concerns in the area of labor relations, the Court "has been unwilling to declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions." Farmer v. United Brotherhood of Carpenters and Joiners of America, 430 U.S. 290, 295-96 (1977), quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971). In matters which would otherwise fall within the primary jurisdiction of the NLRB, the states have therefore traditionally been permitted to act in areas which affect the well-being of their citizens and which only tangentially affect federal labor policy.

As noted by this Court in Farmer, "In referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from

that based predominantly on the primary jurisdiction of the National Labor Relations Board . . . although the two are often not easily separable. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 N. I9 (1969) 430 U.S. ____. In Sears Roebuck & Co. v. Carpenters, ___ U.S. ___, 98 S.Ct. 1745 (1978), the court further refined its definition of "primary jurisdiction" to refer to the "various considerations . . . which militate in favor of preempting state court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the Federal Board", 46 USLW 4446 N. 29. The Garmon line which stands upon the primary jurisdiction of the NLRB is, of course, distinct from those cases which turn upon an inquiry as to whether "Congress intended that the conduct involved be unregulated because left to be controlled by the free play of economic forces: NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)"; Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission, supra. It is submitted, however, that if local interests are permitted to withstand the far stricter Garmon scrutiny, then, a fortiori, New York's interest must be carefully weighed before it is abandoned in the wake of a merely inferred federal concern over state conduct which only tangentially influences the free play of economic forces.

In Farmer, this Court reiterated the principle that it would refuse to apply the pre-emption doctrine to activity that would otherwise fall within the area

of federal pre-emption if it was "merely of peripheral concern to the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of a compelling Congressional mandate, it could not be inferred that Congress had deprived the states of the power to act." 420 U.S. at 304 , citing Garmon. Farmer characterized this Court's prior pre-emption holdings as "reflect[ing] a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation." The Court stressed that:

> " . . . inflexible application of the [pre-emption] doctrine is to be avoided, especially where the state has a substantial interest in regulation of the conduct at issue and the state's concern is one that does not threaten undue interference with the federal regulatory scheme." 430 U.S. 302.

See also, Vaca v. Sipes, 386 U.S. 171, 180 (1968).

There are numerous areas which the Court has found to touch deeply rooted local interests and to concern only tangentially federal interests. See, e.g., Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (malicious libel); Automobile Workers v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence);

International Association of Machinists v. Gonzalez, 356 U.S. 617 (1958) (wrongful expulsion from union membership); Youngdahl v. Rainfair, 355 U.S. 131 (1957) (violence); Farmer v. United Brotherhood of Carpenters, supra (tort of intentional infliction of emotional distress). In each instance, the state was permitted to exercise tort claim jurisdiction because of the significant state interest in saving harmless its citizens and the relatively minor risk of interference with the federal scheme. The continuing vitality of those holdings was only recently confirmed by Sears Roebuck & Co. v. Carpenters, supra.

The Court below recognized that New York's provision of benefits to strikers grows out of the State's legitimate interest in the social and economic well being of its citizens, 566 F.2d at 393, n. 5. Indeed, payment of unemployment compensation traditionally has been viewed as an area of substantial local concern. As the Report of the Joint Legislative Committee on Unemployment asserted in 1931, "[W]elfare work and social relief has always been regarded as a local community problem." New York Legislative Documents, 1931 No. 112, p. 4. The State's interest in operating its unemployment compensation program is twofold. First, it seeks to further "broad humanitarian concerns" by alleviating the hardships suffered by unemployed workers and their families. See Ferarra v. Catherwood, 10 N.Y.2d 1, 217 N.Y.S.2d 11 (1961). New York State's Legislature set forth this concern in

1935, on enactment of the Unemployment Insurance Law:

> "Economic insecurity due to unemployment is a serious menace to the health, welfare and morale of the people of this State." N.Y. Labor Law §501 (McKinney 1977)

The second crucial concern of the State, inextricably linked with its humanitarian interest in mitigating the economic and socialdislocation suffered by the unemployed and his or her family, is its interest in maintaining the economic integrity of the affected community. As Harold Kasper, the Director of the Unemployment Insurance Division of the New York Department of Labor (in enumerating the objectives of the statute), testified at trial:

> "One, we play a definite role in cushioning the economy. In 1975, for example, we paid out, New York State alone, 2.2 billion dollars in benefits, all programs . . . This money is not saved. These are hot dollars, they are velocity dollars, they are spread out in the economy; they pay the butcher, baker -- I used to say candlestickmaker, but now I say the electric company, and I include the New York Telephone Company." (Transcript, p. 968)

New York's legislative scheme underscores its primary concern for the well being of its citizens. Although under

New York's Unemployment Insurance Law, persons who are separated from employment because of a "strike, lockout or other industrial controversy" are deemed to have "good cause" for their separation from employment, New York State Labor §583 (McKinney's 1977), they must wait seven weeks beyond the normal one week waiting period before they are eligible for benefits. New York Labor Law §592(2) (McKinney's 1977). The Court below acknowledged that New York's policy in that regard grows out of its legitimate concern for the well-being of its citizens. It should be understood that New York has not and does not attempt to strike a balance between the competing interests of management and labor. Rather, the balance is between New York's self-evident neutrality in the economic struggle and its professed aim of

safeguarding the welfare of its citizens. 5/

The additional seven week period of initial disqualification is extremely significant. New York has chosen to delay payment of benefits until it can legitimately be presumed that persons unemployed face a real need for such benefits. Moreover, the surrounding communities who depend upon the commerce otherwise generated by striking employees for their economic sustenance can additionally be presumed after an eight-week delay to require such aid.

Petitioners have demonstrated absolutely no appreciable impact upon the Federal scheme against which to balance New York's compelling interest.

The statistical data adduced at trial

5/ It can, of course, be argued that New York's initial suspension of benefits impermissibly tips the scales in favor of management. See, e.g., Sadallah v. KLM Royal Dutch Airlines, 53 A.D.2d 485, 386 N.Y.S.2d 228 (3rd Dept. 1976) in which the New York court held that:

"Many workers lose their employment during labor controversies as the innocent victims of events beyond their control and we do not perceive our system as having any reassurable impact on the side of organized labor or business. To the extent workers are subsidized, the initial suspension of benefits is clearly in favor of business."

fully supports the observation that New York's granting of benefits to strikers simply does not significantly impact on the collective bargaining process. Thus, New York has a shorter average strike duration than the average for other states (A. 511, D. Ex. 113-A). In a comparison of strikes which lasted more than eight weeks, New York is sixth out of the fifty states and Rhode Island, the only other state with a similar statute, is twenty-ninth (A. 512, D. Ex. 113-B). There is therefore no support in the record of the case for a claim that New York's payment of benefits to strikers has an appreciable impact on relative collective bargaining strength.

Accordingly, as the state is deeply concerned with the welfare of its citizens and as there is only a limited potential for interference with the federal scheme, the decisions of this Court clearly require that the doctrine of pre-emption be held inapplicable.

III.

PETITIONER'S RELIANCE UPON NASH v. FLORIDA INDUS. COMM'N RESTS ON A MISAPPREHENSION OF THE COMPETING STATE AND FEDERAL INTERESTS.

Petitioners' reliance upon Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967) as "standing four square against the holding below" (P. Brief 44) illustrates their failure to analyze the nature of the respective interests

involved herein. Nash concerned the right of an employee to file charges with the National Labor Relations Board without retaliation by the State in the form of a denial of unemployment benefits. Florida's interest was slight indeed - perhaps the protection of its treasury from those few who are unemployed and, in addition, file unfair labor practice charges. The federal interest, however, was overriding. Congress expressly demonstrated the importance it attached to maintaining a right of access by workers to the NLRB by devoting thereto an entire section of the Act (29 U.S.C. 158(a)(4)). The NLRB has consistently recognized that the prohibition contained in 29 U.S.C. 158(a)(4) is "a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of [the] Board without fear of reprisal and is clearly required in order to safeguard the Board's processes." Filmation Associates, Inc., 227 NLRB No. 237 (1977) (emphasis added); see also, General Services, Inc., 229 NLRB No. 134 (1977). It is precisely because of the importance of this issue to the federal scheme that courts have adopted a "liberal" approach to this section, in order to fully effectuate its remedital purpose. NLRB v. Scrivener, 405 U.S. 117, 224 (1972), reh. den., 405 U.S. 1033 (1972).

Nash can hardly be said to support Petitioners' position. Congress has repeatedly approved the practice of paying unemployment benefits to strikers. Even if that were arguable,

Congress has clearly failed to expressly disapprove of the practice in the manner relief upon by the Court in Nash. Indeed, Nash lends additional weight, if any be needed, to the contention that state action in the area of social benefits is to be pre-empted only when it directly frustrates the accomplishment of an overriding Federal interest.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

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June 29, 1978

Re: New York Telephone Co., et al. v. New York State Department of Labor, et al.
No. 77-961

Jerome Tauber, Esq.
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380 Madison Avenue
New York, New York 10017

Dear Mr. Tauber:

We have received your letter of June 23, 1978 requesting our consent to the National Lawyers Guild's filing of a brief amicus curiae in the above referenced case.

We must advise you that we cannot consent to your participation in the litigation since the Guild's general interest as expressed in your letter is too remote from the specific issues in the case.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By

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OUR FILE NO.
1187

June 27, 1978

Jerome Tauber,
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Re: New York Telephone Co., et al. v.
New York State Dep't of Labor, et al.
U.S. Supreme Court Docket No. 77-961

Dear Mr. Tauber:

Petitioners consent to your request to file a brief herein on behalf of the National Lawyers Guild as amicus curiae.

Very truly yours,

DLB:kc